

## WFG Informational Bulletin

To: All WFG Agents and Direct Offices  
From: WFG Underwriting  
Date: March 3, 2022  
Bulletin No: NB 2022-02  
Subject: Things to Consider When Closing a Transaction with Bitcoin or Other Cryptocurrency

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It has been reported that more than 100,000 merchants worldwide accept Bitcoin. Companies such as Microsoft, Expedia, Newegg, Overstock and Subway all accept Bitcoin payments. It was only a matter of time until cryptocurrency made its way into real estate closings. Our agents across the country are regularly getting that request.

With more consumers coming to the closing table with some type of cryptocurrency, it is important for title and settlement companies to have policies and procedures in place to handle these cryptocurrency transactions – even though management of your escrow and settlement business is not within the scope of your agency agreement with WFG.

### **Understand the Type of Transaction**

The first question a title and settlement company must ask is about the type of transaction. This should be spelled out very clearly in the purchase and sale agreement. The transaction could either require the conversion of the cryptocurrency to cash or be a cryptocurrency-for-land exchange between the buyer and seller.

If the buyer has cryptocurrency, but the seller wants cash, then the transaction is no different than a “normal” transaction. As title professionals, we are not concerned with what legal assets – stock, bonds, other land, or cryptocurrency – may have been sold to generate the funds which are ultimately wired into our trust account.<sup>1</sup> Our concern is receipt of “good funds” after the cryptocurrency has been converted to US Currency for your closing.

If, on the other hand, you have a buyer that says they want a seller’s property and a seller that wants cryptocurrency, they can structure the transaction as a property-for-property swap. This is how 1031 exchanges were originally handled. But that structure will require specially drafted language in both the purchase and sale agreement and in your escrow instructions and introduces several complicating factors.

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<sup>1</sup> We do have the requirement to run SDN checks on all parties to the transaction.

*Information Bulletins are designed to provide our agents with information we think will help in managing their business or just being better title professionals, but which does not rise to the level of being an underwriting mandate and are not within the scope of the agency agreement.*

## **Taxes**

We at WFG do not, and very few of our agents have the tax knowledge, expertise and appropriate licenses to offer tax advice. In cryptocurrency for land swaps, we have seen a number of customers coming in with (likely) erroneous expectations as to the tax treatment of such a swap. So we **STRONGLY ENCOURAGE** both parties to consult with their own tax advisers, and suggest our agents document this advice in writing.

In March 2014, the Internal Revenue Service (IRS) issued Notice 2014-21 providing that virtual currency is treated as property for U.S. federal tax purposes. As of January 1, 2018, the Tax Cuts and Jobs Act, P.L. 115-97, amended § 1031 to limit like-kind exchange treatment to exchanges of real property.

That means almost every Crypto for Land swap will potentially trigger taxable gain recognition for both parties.<sup>2</sup> If there is not a tax advantage, why not liquidate the cryptocurrency and wire U.S. Dollars into the closing – and avoid all the other complications? But those are questions best left to the tax professionals advising your parties.

### **Where will you Keep the Cryptocurrency?**

The escrow laws in most states say funds must be held by a title agency in a federally-insured account. Currently, there aren't any federally insured cryptocurrency accounts. So the closing agent (in most states) is not permitted to have its own cryptocurrency wallet to use in facilitating the transaction. As a closing or settlement agent, you are required to comply with your state laws, and unfortunately most state escrow laws simply have not caught up with the idea of cryptocurrency.

In this scenario, the title agent should make certain the buyer and seller both have a cryptocurrency wallet, a software program that "stores" the virtual currency. The sale consideration would be handled directly between the buyer's and seller's cryptocurrency wallets, and outside of the title agent or escrow officer's control or their accounts. All of those details need to be spelled out with great clarity in either the purchase and sale agreement or in the escrow agreement.

The parties would still need to separately deposit U.S. Dollar funds with the closing agent for closing charges, taxes, mortgage payoffs and other costs that are applicable to the transaction.

Although it is not within the scope of your agency agreement, your WFG underwriters are available to help our agents work through the special and very detailed escrow agreements unique to a cryptocurrency transaction.

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<sup>2</sup> This is reiterated in IRS Memorandum [202124008](#), released 6/18/2021.

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## **Who bears the Risk of Changing Values? How do you Report It?**

Another issue with cryptocurrency is that its value has been highly volatile. The drafting of both the Purchase and Sale Agreement and of the Escrow Instructions need to be very clear as to which party bears the risk of fluctuating values – and it should be very clear that it is not the closing agent – even for fluctuations that occur during the closing.

You don't want to close a contract that sets the purchase price at "\$200,000 worth of Bitcoin" because of the risk of fluctuation while in transit. While the parties can agree on the terms of their cryptocurrency for land swap – "I'll give you 5 Bitcoins for your house" -- the closing agent is still expected to make various tax and governmental reports and has some responsibility to make sure the agreed value to be reported to the government is "within reason" based on the fluctuating values as of the date of closing. The purchase and sale agreement needs to be express on which party bears the risk of a change in value of the cybercurrency, including should tax or other authorities disagree with the valuations reported, and on the agreed values to be used in official reports.

The title and settlement company needs thorough escrow instructions that covers all the variables in order to protect itself. Instructions should specify that the seller agrees to accept a certain quantity of cryptocurrency and into which cryptocurrency wallet the currency is to be sent.

### **Additional concerns include:**

- Having enough money in U.S. currency to pay-off loans, pay taxes, releases, payoffs, recording fees and other things that require cash – and, of course, your fees.
- What value to enter on the federally mandated Closing Disclosure
- Reporting to FinCEN, the IRS and state tax authorities

Ideally the written escrow instructions should address each of those questions.

### **How to Actually Handle the Closing.**

The last concern is how to actually handle the closing. In a "normal" closing, the Closing agent is the trusted intermediary, and neither side gives up any rights or interests until the trusted intermediary has all of the funds, important assets and documents in its custody. The deed, the mortgage, the lender proceeds, the purchaser's money, etc.

Because of the "good funds" and insured account restrictions, the closing agent usually can't take possession or control of the cryptocurrency. So you wind up at a closing in which you possess everything except the cryptocurrency, and are waiting for the seller to confirm that they have received the cryptocurrency directly into their wallet. That requires an element of trust between the parties since there is no trusted intermediary holding the cryptocurrency.

As always, cybersecurity and info-security should be a concern to all parties, especially given the anonymity of many cyber-wallets. The numbers and codes absolutely have to be correct and as provided by the actual parties.

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## **WFG Underwriting Requirements**

- Separate underwriting approval is not required for transactions in which cryptocurrency is converted to U.S. dollars prior to closing so that the closing may be conducted entirely in U.S. dollars.
- Underwriting approval is required to issue a Closing Protection Letter (“CPL”) in connection with a cryptocurrency real estate transaction. This will not be given until the underwriter has reviewed the purchase and sale agreement, the proposed escrow agreement, and any written closing instructions from the buyer or seller.
- The Amount of Insurance in a title insurance policy should NOT be listed in a cryptocurrency denomination. Only in U.S. Dollars.

Because of the added complications and related costs, that there is rarely a tax benefit in a Cyber for Land swap, we generally recommend that the buyer liquidate their cryptocurrency holdings and deliver U.S. Dollars by wire to close any transactions.

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